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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

COLE ALLEN WILKINS,

Defendant and Appellant.

G055603

(Super. Ct. No. 06NF2339)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed as modified.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Cole Allen Wilkins burglarized a home under construction. He unsafely loaded stolen appliances into a pickup truck without putting the tailgate up or securing the load. As he drove on a freeway, a stove fell off the back of the truck. Three traffic collisions ensued; the third collision resulted in the death of David Piquette. A jury found Wilkins guilty of first degree murder under a felony-murder theory (burglary in progress). The California Supreme Court reversed due to an instructional error.

Before a retrial, Wilkins learned that certain California Highway Patrol (CHP) officers had destroyed and altered their initial reports, which contained differing opinions about the causes of the collisions. The prosecution failed to disclose this exculpatory evidence. Wilkins filed a motion to recuse the Orange County District Attorney (OCDA), and a motion alleging outrageous government conduct. The trial court found prosecutorial misconduct, but did not recuse the entire OCDA's office. As a sanction, the court excluded felony murder as a theory of liability during the retrial.

At the retrial, the jury found Wilkins guilty of second degree murder under an implied malice theory. We find that there was insufficient evidence to sustain the conviction. We will therefore exercise our discretion and reduce Wilkins's second degree murder conviction to involuntary manslaughter. (Pen. Code, § 192, subd. (b).)¹

I

FACTS AND PROCEDURAL BACKGROUND

On July 7, 2006, at around 5:00 a.m., Wilkins was driving westbound on the 91 Freeway in Orange County. There was one carpool lane; immediately to the right was lane number one, then lanes two, three, four, five, and the right shoulder. The traffic during the early Friday morning commute was not congested, but there were vehicles in

¹ Further undesignated statutory references are to the Penal Code.

every lane. It was still dark. Wilkins was travelling in the number two lane at about 55 to 60 miles per hour.

Wilkins was driving a Ford F250 truck. There were several appliances and other household items piled in the back of the truck. Wilkins had stolen the items from a home under construction in Riverside County; the stolen items also filled up the cab. There were no ties holding down the items in the bed of the truck. The tailgate was down. After the truck drove through a bumpy and curved portion of the freeway, a large stove fell from the back of the truck. Within the next five or so minutes, several people called 911 and three collisions occurred.

The First Collision – D. Lay

D. Lay was driving a car westbound on the 91 Freeway in the number two lane, about 10 to 12 car lengths directly behind Wilkins's truck. Lay saw the stove fall off the back of the truck. Lay tried to avoid hitting the stove, but there was traffic on both sides of him. Lay's car collided with the stove, hitting the right front bumper in what Lay described as a "glancing blow." Lay continued to follow the truck and tried to get Wilkins's attention by flashing his lights and honking his horn. After about two miles, Wilkins slowed down and began to pull over, but then he accelerated again. Wilkins eventually exited the freeway.

At the top of an off-ramp, Lay yelled out his window, "'You need to pull the truck over.'" Wilkins responded, "'I will pull over, but I am going to f**k you up.'" Wilkins eventually stopped in a parking lot. When Lay told him something had fallen off his truck, Wilkins said, "'Oh my God. That was an f[*]-ing thousand dollar stove.'" Lay asked to see Wilkins's driver's license and registration. Wilkins told Lay that he did not have his driver's license with him. Wilkins provided La with a false first name.

The Second Collision – C. Thomas and R. Howard

C. Thomas was driving westbound on the 91 Freeway in the number two lane when the vehicle in front of him suddenly swerved. Thomas then saw a stove on the freeway and he tried to avoid hitting it, but there was traffic on both sides of him. After colliding with the stove, Thomas pulled over to the right shoulder.

R. Howard was driving westbound on the 91 Freeway in the number three lane next to Thomas. Howard heard Thomas's car collide with the stove in the number two lane. As a result, the stove was pushed into the number three lane and Howard also collided with the stove.² Howard pulled his car over to the right shoulder. Howard's car was disabled; Thomas gave Howard a ride to a parking lot just off the freeway.

The Third Collision – T. Hipsher and Piquette

T. Hipsher was driving westbound on the 91 Freeway in the number four lane. Hipsher was driving a big rig truck carrying two double trailers fully loaded with powdered cement. Piquette was driving a car westbound in the number one lane; he swerved sharply to the right, in an apparent attempt to avoid hitting the stove. Piquette's car veered across the freeway and collided with the left side of Hipsher's truck. The truck jack-knifed sideways and flipped over, landing on top of Piquette's car. Piquette was crushed to death.

Court Proceedings

The OCDA charged Wilkins with murder. The information further alleged that Wilkins had incurred a prison prior. A jury found Wilkins guilty of first degree murder based on the felony-murder rule (fleeing from a burglary). The court found true

² Although the second incident involved two cars, the CHP treated the Thomas/Howard crashes as one collision.

the prison prior and imposed a sentence of 26 years to life. This court affirmed. The California Supreme Court reversed due to an instructional error.

Prior to the retrial, Wilkins moved to recuse the entire OCDA's office due to the alleged destruction and altering of CHP police reports. The trial court denied the motion without conducting an evidentiary hearing. This court issued an alternative writ, ordering the trial court to conduct an evidentiary hearing. The court conducted a hearing, which lasted several days. At the conclusion of the hearing, the court issued a written ruling. The court found that the OCDA's office violated its obligation to disclose exculpatory evidence. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*).) The court did not recuse the entire OCDA's office, but the court did recuse the two former prosecutors (now superior court judges) who were substantially involved in the first trial.

Wilkins also filed a pretrial motion to dismiss the information due to outrageous government misconduct. In a written ruling, the court did not dismiss the information, but as a sanction the court excluded "the felony murder rule as a theory under which the prosecution may proceed during [the retrial]."

A second jury found Wilkins guilty of second degree murder under an implied malice theory. The court imposed a prison sentence of 16 years to life.

II

DISCUSSION

Wilkins contends: the trial court erred by denying his pretrial motion to recuse the entire OCDA's office; the court erred by denying his pretrial motion to dismiss for outrageous government conduct; and there was insufficient evidence to sustain the murder conviction. We shall address each contention in turn.³

³ We need not address Wilkins's several remaining contentions given our decision regarding the murder conviction and our disposition of the matter.

A. Motion to Recuse

Wilkins argues that the trial court abused its discretion by denying his motion to recuse the entire OCDA's office. We disagree.

1. General Legal Principles

“[A] motion to disqualify a district attorney from performing an authorized duty . . . may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” (§ 1424, subd. (a)(1).) “‘The statute “articulates a two-part test: ‘(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?’” [Citation.] The defendant ‘bear[s] the burden of demonstrating a genuine conflict; in the absence of any such conflict, a trial court should not interfere with the People’s prerogative to select who is to represent them.’ [Citation.] That burden is especially heavy where . . . the defendant seeks to recuse not a single prosecutor but the entire office.” (*People v. Trinh* (2014) 59 Cal.4th 216, 229.)

“A conflict under section 1424 ‘exists whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is “actual,” or only gives an “appearance” of conflict.’ [Citation.] However, for recusal to be granted, defendant must demonstrate that fair treatment by the office is unlikely.” (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1479-1480.) On appeal, we review factual findings for substantial evidence and an order denying the motion for an abuse of discretion. (*Melcher v. Superior Court* (2017) 10 Cal.App.5th 160, 165-166.)

A prosecutor must disclose: “Any exculpatory evidence.” (§ 1054.1, subd. (e); *Brady, supra*, 373 U.S. at p. 87.) Exculpatory evidence includes any evidence that is materially favorable to the defendant. (*Ibid.*) The prosecutor’s constitutional *Brady* obligation exists regardless of whether the defendant has requested the materials. (*United*

States v. Agurs (1976) 427 U.S. 97, 107.) Further, the *Brady* obligation is not limited to evidence the prosecutor's office itself actually is aware of and possesses, but includes "evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.)

2. Relevant Proceedings

Prior to the retrial, Wilkins filed a motion to recuse the OCDA, or in the alternative, the individual prosecutors involved in the first trial.

As the trial court summarized in its ruling: "Shortly after the fatal collision which is the subject matter of this homicide prosecution, at least two investigating [CHP] officers opined that related crashes, including the fatal event, were not caused by this defendant; rather, they were caused by the errant driving of other motorists who either struck, or took evasive action to avoid, the stolen stove that had fallen on to State Route 91 from a truck being driven at the time by the defendant. Reports containing these officer's opinions regarding the causation of these collisions were later changed either by their authors or by a superior CHP officer in such a way as to suggest that this defendant's conduct was the cause of the fatal crash. The initial reports, with their exculpatory opinions, were then destroyed, and the defendant remained unaware of them until long after his now-reversed trial conviction."

The court found: "An opinion expressed in writing by a veteran [CHP] officer that this defendant's conduct was not the 'Primary Collision Factor' in this fatal collision was without question Brady material. . . . The defendant should have received the exculpatory material contained in the destroyed reports prior to his first trial pursuant to the Brady discovery rule. Instead, the evidence was suppressed and later destroyed."^[4]

⁴ The suppressed evidence as well as the evidence concerning the destruction and/or altering of the police reports was presented to the jury in the retrial.

The court therefore finds that serious misconduct by members of the prosecution team occurred in this case.”

The court ruled: “After evaluating the testimony of the named prosecutors in conjunction with all of the other evidence received, this court believes that it is necessary to recuse Mr. Murray and Mr. Yellin. Both of these prosecutors were deeply involved in this case when the misconduct occurred, Mr. Yellin as the case filer and the prosecutor who presented the matter on behalf of the People at the preliminary hearing, and Mr. Murray as the trial prosecutor. During [their] recent testimony, each has denied knowledge of any changed or destroyed reports. Unfortunately, that testimony does not resolve the issues raised by this recusal motion.”⁵

As to recusal of the OCDA, the court stated that while “there was serious misconduct by individual members of the prosecution team, the court does not believe that the record in this case supports the extraordinary findings required to recuse the entire District Attorney’s office. That motion must therefore be denied.” The court noted that the intervention of the elected district attorney “could have impacted Mr. Yellin’s decision to file a murder charge against the defendant despite his apparent early hesitation to do so, or that Mr. Murray decided to ignore the red flags he encountered based upon his possible awareness of the District Attorney’s early interest in the case. It is likewise possible that some future prosecutor could possibly be motivated by a misguided sense of loyalty or friendship to a former colleague and as a result treat this defendant unfairly.”

However, the court stated that: “In this court’s view, and keeping in mind that the number of lawyers employed by the OCDA runs into the hundreds, the evidence in the current record is insufficient to support a judicial inference that any of these possibilities is likely enough to warrant the office wide recusal requested.”

⁵ The court noted that the recusal of Yellin and Murray was “at this point largely symbolic since neither is any longer employed by the [OCDA].”

3. Analysis

Wilkins concedes that there is substantial evidence to support the trial court's findings of fact. Therefore, our review is limited strictly to whether the trial court abused its discretion when it found that the recusal of the entire office of the OCDA was not warranted. While we recognize that other judges may have come to a different conclusion, Wilkins has not established that the court's ruling was beyond the bounds of reason or that it applied the wrong legal standard. Indeed, the court thoroughly summarized the relevant facts, the appropriate law, and then applied the facts to the law in an eight-page ruling. The court cited several authorities for the general proposition that the recusal of an entire district attorney's office is a disfavored remedy, particularly in a large district attorney's office such as the OCDA's office. In sum, the court did not abuse its discretion by denying Wilkins's motion to recuse the entire OCDA's office.

Wilkins argues that *People v. Dekraai* (2016) 5 Cal.App.5th 1110 (*Dekraai*), compels a different result. In *Dekraai*, the defendant shot and killed seven people inside of a Seal Beach beauty salon. (*Id.* at pp. 1116-1117.) While the defendant was in custody, the OCDA, together with the Sheriff's office, acquired statements from the defendant (and other represented defendants) through the use of an undisclosed jailhouse informant program. (*Id.* at p. 1115.) The trial court found that the OCDA had engaged in constitutional discovery violations and violated the defendant's right to counsel. (*Ibid.*) Eventually, the court (the same trial judge as in this case) granted the defendant's motion to recuse the entire OCDA's office, concluding that "the OCDA's institutional relationship with the Sheriff constituted a conflict of interest that prevented the OCDA's Office from fairly prosecuting the penalty phase." (*Id.* at p. 1116.) This court affirmed the trial court's ruling finding "it was well within the court's discretion to recuse the entire OCDA's Office from prosecuting the penalty phase because the OCDA Office had a disqualifying conflict of interest." (*Id.* at p. 1114.)

In this case, we find that it was well within the court’s discretion *not* to recuse the entire OCDA’s office. The relevant facts of the two cases are markedly different and therefore the ruling in *Dekraai* does not compel the same ruling in this case. Here, although there was evidence of misconduct by two individual prosecutors, there was no evidence of systemic misconduct as in *Dekraai*. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 375 [“Recusal is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that *future* proceedings will be fair”].)

Wilkins argues: “Although the [re]trial prosecutor was not involved in this case until after the trial court ruled on the recusal motion, she continued the pattern of misconduct.” Wilkins’s argument is not persuasive because it is based on conduct that occurred after the court ruled on the pretrial motion. (See *People v. Welch* (1999) 20 Cal.4th 701, 739 [“We review the correctness of the trial court’s ruling at the time it was made . . . and not by reference to evidence produced at a later date”].)

B. Motion to Dismiss for Outrageous Government Conduct

Wilkins argues that the trial court erred by denying his pretrial motion to dismiss for outrageous government conduct. We disagree.

1. General Legal Principles

A trial court has the inherent authority to dismiss a case based on outrageous government conduct. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1002-1003 (*Guillen*).) The conduct must have “‘shocked the conscience’ and [been] so ‘brutal’ and ‘offensive’ that it did not comport with traditional ideas of fair play and decency.” (*Breithaupt v. Abram* (1957) 352 U.S. 432, 435.) “‘For a due process dismissal, the [g]overnment’s conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice. [Citations.] The [g]overnment’s involvement must be *malum*

in se or amount to the engineering and direction of the criminal enterprise from start to finish.”” (*Guillen, supra*, 227 Cal.App.4th at pp. 1004-1005.)

California courts have considered the following factors relevant when analyzing claims of outrageous government conduct: ““(1) whether the police manufactured a crime which otherwise would not likely have occurred . . . ; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant’s reluctance to commit the crime is overcome . . . ; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.”” (*Guillen, supra*, 227 Cal.App.4th at p. 1006.)

There is a split of authority as to the appropriate standard of review. Most appellate courts have found “the sanction of dismissal is clearly *discretionary* and is only required in particularly egregious cases.” (See *People v. Truer* (1985) 168 Cal.App.3d 437, 443, italics added; accord *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 444-445 (*Velasco-Palacios*); *People v. Shrier* (2010) 190 Cal.App.4th 400, 418; *People v. Hayes* (1988) 200 Cal.App.3d 400, 412; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 435.) However, two appellate courts have held that the sanction of dismissal is reviewed *de novo*. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 855-859 (*Uribe*); accord *Guillen, supra*, 227 Cal.App.4th at pp. 1006-1007.)

Due process requires the disclosure of material exculpatory evidence. (*Brady, supra*, 373 U.S. at p. 87.) Trial “courts have broad discretion in determining the appropriate sanction for discovery abuse . . . sanctions . . . *may* be required in order to ensure that the defendant receives a fair trial, particularly when potentially favorable evidence has been *suppressed*.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) However, a “court shall not dismiss a charge . . . unless required to do so by the Constitution of the United States.” (§ 1054.5, subd. (c).)

2. Relevant Proceedings

After the trial court ruled on the recusal motion, Wilkins filed a renewed motion to dismiss for outrageous government conduct. Wilkins asked the court to dismiss the information, “or in the alternative, dismiss the first degree felony murder charge (while leaving any lesser included offenses).” The court conducted additional evidentiary hearings.

CHP Officer John Heckenkemper testified that he was the first CHP officer at the crime scene on July 7, 2006. Heckenkemper moved the stove to the shoulder of the freeway, and then later spoke to the parties involved in the second collision (Thomas and Howard), who were waiting in a Carl’s Jr. parking lot located just off the freeway. Heckenkemper wrote a report that identified the Primary Collision Factor (PCF) for the second collision. Heckenkemper opined that Howard was at fault, concluding that he was driving too fast for the conditions. Heckenkemper submitted his report and it was signed off by a reviewing officer in the Accident Investigation Unit (AIU) before he went on vacation the following day.

Heckenkemper testified that when he returned from vacation, he spoke to Sergeant Joseph Morrison who told Heckenkemper that he had destroyed his report and reinvestigated the matter on his own. Morrison told Heckenkemper that he changed the PCF to ““other than driver”” because Wilkins was being charged with felony murder and “they” wanted the PCFs in the three collisions to be consistent. Heckenkemper said that before the first trial began he met with OCDA Investigator Van Diver at the collision site to pinpoint the location of the stove before he moved it to the shoulder. Heckenkemper told Van Diver that his report had been changed and he did not agree with Morrison’s PCF. Van Diver said something like, “I don’t want to hear about it.”

Before retiring, CHP Chief Steven Beeuwsaert had overseen all the operations for the Southern Division. Beeuwsaert testified that Heckenkemper informed him that PCFs had been changed in reports regarding the death of Piquette (an off-duty

sheriff's officer) in order "to help with the prosecution for murder." Beeuwsaert said that it is not normal for someone to change a PCF without consulting with the officer who wrote the report, and that it was not normal to change a report after someone from AIU had signed off on the report. Beeuwsaert testified that this violated written CHP policies. Beeuwsaert said that he had told the trial prosecutor (Murray) about the changed reports because he knew Wilkins's trial was still in progress; Murray told Beeuwsaert that it did not matter because Wilkins was a fleeing felon.

After hearing from several additional witnesses, the trial court issued a written ruling. With the consent of the parties, the court also considered the evidence it had heard during the earlier recusal motion. After summarizing the evidence, and citing the legal standards, the court found that "the defendant has failed to prove the existence of 'outrageous government conduct' here . . . 'in the constitutional sense of violating the defendant's due process rights.'" The court found that Wilkins "has failed to establish that either the CHP or OCDA 'engaged in outrageous government conduct that impacted a protected right or prevents (him) from receiving a fair trial.'" However, the court went on to hold that: "This ruling does not resolve all of the issues raised in the pending motion . . . as this court believes . . . that it retains broad discretionary power to impose sanctions for the type of serious discovery violations which have occurred here."

The court stated that it would "impose sanctions not to punish the People for past misconduct, but to insure the defendant's future trial is a fair one." The court stated the trial prosecutor did not act because "he was proceeding on a theory . . . based on the felony murder rule which he believed did not attach any significance to issues involving 'causation' or 'contributory negligence. . . .' [¶] The court respectfully suggests that the People's analysis in this area is faulty. Therefore, as an appropriately proportional sanction for the prosecution's grave discovery violations in this case, and to insure that the defendant's new trial is fair, this court now excludes the felony murder rule as a possible theory of culpability at the defendant's retrial. That leaves the People

with a more traditional ‘implied malice’ homicide prosecution during which presumably the People will agree that competent causational evidence is relevant, and familiar causational jury instruction such as CALCRIM 240 must be given.”

3. Analysis

After independently reviewing the record, we agree with the trial court’s analysis. We find that the evidence before the court did not establish “outrageous government conduct” sufficient under the law to warrant the pretrial dismissal of Wilkins’s criminal case; we would also find no abuse of the court’s discretion were we to apply that standard of review. In the colloquial sense, the destruction and altering of police reports is certainly “outrageous” and intolerable under our criminal justice system. But the dismissal of a criminal charge remains “an extraordinary remedy, . . . reserved for the few cases where conduct by the prosecution has completely eliminated the possibility of a fair retrial.” (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1387.)

Here, the content of the destroyed and/or altered CHP reports became known to Wilkins before the retrial. Further, as a result of the trial court’s ruling, the jury would have the opportunity to hear the exculpatory opinion evidence regarding causation—and the evidence about the CHP’s destruction and altering of the reports—during the retrial. Indeed, the court’s sanction, which eliminated the felony-murder rule as a theory of liability, amplified the relevance of this evidence. In short, the court’s denial of Wilkins’s motion to dismiss did not eliminate the possibility of a fair retrial.

Wilkins argues that *Velasco-Palacios*, *supra*, 235 Cal.App.4th 439 compels a different result. In *Velasco-Palacios*, the People charged the defendant with five counts of committing a lewd act on a child, the daughter of defendant’s girlfriend. (*Id.* at p. 442.) During plea negotiations, the prosecutor fabricated and inserted two additional lines into a transcript of the defendant’s police interrogation: “[Detective]: You’re so guilty you child molester. [¶] ‘[Defendant]: I know. I’m just glad she’s not pregnant

like her mother.”” After the defendant’s counsel received the altered transcript, he advised the defendant to plead guilty; counsel told the defendant that the transcript included an admission of penetration, which could be used to file more serious charges with the possibility of a life sentence. (*Id.* at pp. 442-443.) After the fabrication had been revealed, the trial court granted defendant’s motion to dismiss on the basis of outrageous government conduct. (*Id.* at p. 442.) The court found that the prosecutor’s misconduct ““diluted the protections coming with the right to counsel”” and risked the defendant being fraudulently induced to enter a plea. (*Id.* at p. 444.)

The Court of Appeal affirmed the order of dismissal. (*Velasco-Palacios, supra*, 235 Cal.App.4th at p. 452.) “Once the fraudulent nature of [the altered transcript] was revealed, defendant . . . was justified in having suspicions as to whether his attorney was representing defendant’s interests or acting as an agent of the state by presenting falsified evidence to defendant while simultaneously advising defendant to settle the case.” (*Id.* at p. 451.) Although the defendant’s original counsel had been replaced, the court essentially found that the defendant’s level of trust in any counsel going forward with defendant’s trial had been unalterably prejudiced. (*Id.* at pp. 451–452.)

Here, unlike *Velasco-Palacios*, the government’s misconduct did not interfere with Wilkins’s constitutional right to counsel. The misconduct involved the CHP’s destruction and alteration of exculpatory reports as well as the prosecutor’s violation of *Brady, supra*, 373 U.S. 87. Again, this conduct was certainly “outrageous” and deserving of condemnation. But by the start of the retrial the content of the CHP reports became known to Wilkins. Thus, the potential prejudice going forward was significantly ameliorated, particularly in light of the court’s additional sanctions, which were specifically tailored to protect Wilkins’s right to a fair retrial.

We agree with the Attorney General that the case of *Uribe, supra*, 199 Cal.App.4th 836, is more analogous. In *Uribe*, the defendant was convicted of sex crimes, but the convictions were reversed based on the failure of the prosecutor to

disclose a videotaped interview, and the prosecutor's later deception about what had occurred. (*Id.* at pp. 840-841.) On remand, the defendant moved for dismissal on the ground of outrageous prosecutorial misconduct and the trial court granted the motion. (*Id.* at p. 841.) The Court of Appeal reversed, finding there was "no showing" that the misconduct prevented the defendant from receiving a fair retrial or that the misconduct otherwise prejudiced his rights. (*Id.* at pp. 873-874.) "The trial court's dismissal of the information . . . considered only the prosecutorial misconduct without regard to its impact on defendant. The court failed to tailor the remedy to the harm caused by the misconduct, and gave no consideration to societal interests in having those who have committed serious crimes being brought to justice." (*Id.* at pp. 874-875.)

Here, just as in *Uribe*, there was evidence of government misconduct, but the nature of the misconduct did not eliminate the possibility of a fair trial going forward. And again, unlike the trial court in *Uribe*, the court in this case tailored the remedy to the misconduct by eliminating felony murder as a theory of liability in the retrial.

C. Insufficient Evidence

Wilkins argues that there was insufficient evidence of implied malice to sustain the jury's second degree murder conviction. We agree.

1. General Legal Principles

We review for substantial evidence. (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) Under the substantial evidence standard of review, our power "'begins and ends with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination.'" (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) "[S]ubstantial evidence does not mean any evidence, no matter how slight." (*People v. Baker* (2012) 204 Cal.App.4th 1234, 1247.) It is "evidence which, when viewed in light

of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined.” (*People v. Conner* (1983) 34 Cal.3d 141, 149.)

“Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).) “For purposes of Section 187, malice may be express or implied.” (§ 188, subd. (a).) Under an implied malice theory there are four elements: 1) defendant intentionally committed an act; 2) the natural consequence of the act was dangerous to human life; 3) the defendant knew the act was dangerous to human life; and 4) defendant acted with conscious disregard for that danger. (*People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1358.)

2. Additional Evidence

D. Kane testified that about a week before the burglary, suppliers delivered various household items for a custom home he was building in Riverside County. There were other homes under construction in the surrounding area. According to Kane, the items delivered to the home included a microwave, refrigerator, dishwasher, stove, range hood, sinks, doorknobs, door locks, ceiling fans, and light fixtures.

R. Harbison testified that he was a drywall installation subcontractor. In July 2006, his crew had been working in the area near Kane’s home. Wilkins worked in Harbison’s drywall crew. Wilkins’s job duties involved cleaning out (or scrapping) the extra pieces of drywall and thereafter disposing of the drywall.

K. Trivich testified that she and Wilkins had a former dating relationship. In July 2006, they were in a business relationship, which involved Wilkins constructing a home in Palm Springs; Trivich invested the money, while Wilkins invested “sweat equity.” Trivich had purchased the pickup truck for Wilkins so that he could haul construction and building materials. Cell phone records established that Wilkins drove from Long Beach to Riverside County during the night of July 6, 2006. Trivich testified

that she spoke to Wilkins at about 1:00 a.m., on July 7, 2006. Wilkins told Trivich that “he had obtained big kitchen items.”

N. Blake testified that in July 2006, she was dating Wilkins and they were living together in Long Beach. On the morning of July 7, 2006, Wilkins arrived home with: “Big Boxes. Big, huge boxes filling the back of the truck.” Blake said that nothing was tied down, but the tailgate was closed. Blake testified that the inside of the truck was filled with boxes so high that a person could not see out the back window into the bed of the truck. Blake said that after Wilkins unloaded the truck, she saw some tie-downs in the back pocket of the backseat. At some point Blake overheard Wilkins talking to someone over the phone; Wilkins asked, ““Can they get me for murder?””

3. Analysis

The objective elements of implied malice murder require an intentional ““act, the natural consequences of which are dangerous to life.”” (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) “An act is dangerous to human life, for purposes of implied malice, when there is a high probability it will result in death.” (*People v. Calderon* (2005) 129 Cal.App.4th 1301, 1310.) The question for the fact finder “involves a determination of probability: Although an act that will certainly lead to death is not required, the probability of death from the act must be more than remote or merely possible.” (*People v. Cravens* (2012) 53 Cal.4th 500, 513.)

In addition to proof that a defendant’s intentional actions involved a high probability of death, implied malice also requires proof that the actions were committed ““by a person who knows that his conduct endangers the life of another”” and that the person acts with conscious disregard of that danger to human life. (*People v. Knoller, supra*, 41 Cal.4th at p. 143.) Intent and knowledge are subjective mental states that are rarely susceptible of direct proof; a defendant’s mental state is almost always proven by circumstantial evidence. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.)

Here, when we view the evidence in light of the entire record, it does not inspire confidence that the jury's determination of implied malice "has been justly determined." (*People v. Conner, supra*, 34 Cal.3d at p. 149.) Wilkins did not testify, so there was no direct evidence of his mental state. The circumstantial evidence established that Wilkins burglarized appliances, unsafely loaded them in a truck, and while he was hauling the items on the freeway, an unsecured stove fell from the back of the truck. When this occurred, the tailgate of Wilkins's pickup truck was down and the items in the truck bed were not tied down.

While the circumstantial evidence previously supported a murder conviction under a felony-murder theory (burglary in progress), this evidence simply does not support a murder conviction under an implied malice theory. There was no evidence that Wilkins was speeding, making abrupt lane changes, or otherwise driving dangerously. Thus, we reverse Wilkins's second degree murder conviction.

4. Modification of Conviction to Involuntary Manslaughter

An appellate "court may reverse, affirm, or *modify* a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." (§ 1260, italics added.)

An appellate court is not restricted only to the remedies of affirming or reversing a judgment of conviction; when a reversible error goes only to issue of whether a greater offense may stand, the court may reduce the conviction to a lesser included offense and affirm the judgment as modified, thereby averting necessity for retrial. (*People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097.) An appellate "court's authority

to modify a judgment of conviction to reflect a lesser included offense is permissive, not mandatory.” (*People v. Hamilton* (2018) 30 Cal.App.5th 673, 685.)

“Involuntary manslaughter is a lesser included offense of murder” (*People v. Munoz* (2019) 31 Cal.App.5th 143, 153-154.) “When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.” (CALCRIM No. 580.)

In this case, the court instructed the jury that: “The defendant committed involuntary manslaughter if: [¶] 1. The defendant committed (a lawful act in an unlawful manner); [¶] 2. The defendant committed (the act) with criminal negligence; [¶] AND [¶] 3. The defendant’s acts caused the death of another person.” (CALCRIM No. 580.) The court further instructed the jury that “a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.” (CALCRIM No. 580.)

Wilkins’s actions of loading his truck with large stolen appliances in an unsafe manner (not tying them down), and driving on the freeway with the tailgate down plainly establish criminal negligence. Further, Wilkins’s criminally negligent actions caused the death of David Piquette. Therefore, in the interests of justice, we will modify the judgment to reflect a conviction for involuntary manslaughter.

III

DISPOSITION

The judgment is ordered modified to reflect a conviction for involuntary manslaughter. (§ 192, subd. (b).) As modified, the judgment is affirmed. The matter is remanded to the trial court for the sole purpose of resentencing.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.